

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

PHILLIP A. FLORA,
a.k.a. "Phil P."

Defendant.

Case No.

SACV11-00299-AG-(JEMx)

STIPULATED
PERMANENT INJUNCTION
AND FINAL ORDER

Plaintiff, Federal Trade Commission ("FTC" or "Commission") filed a Complaint for a Permanent Injunction and Other Relief, including redress to consumers and disgorgement of ill-gotten gains, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 53(b) and 57b, and Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. § 7706(a). Plaintiff and Defendant Flora, by and through their counsel, hereby stipulate to the entry of, and request the Court to enter, this Stipulated Permanent Injunction and Final Order ("Order"), to resolve all matters of dispute between them in this action.

1 **IT IS HEREBY STIPULATED, AGREED, AND ORDERED** as follows:

2 1. This is an action by the Commission instituted under Sections
3 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and the CAN-SPAM
4 Act, 15 U.S.C. § 7706(a). The Commission has authority to seek the relief
5 contained herein;

6 2. The Commission's Complaint states a claim upon which relief may be
7 granted under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Section 7(a) of
8 the CAN-SPAM Act, 15 U.S.C. § 7706(a);

9 3. This Court has subject matter jurisdiction pursuant to
10 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), and 7701;

11 4. Venue is proper in this district under 28 U.S.C. § 1391(b) and
12 15 U.S.C. § 53(b);

13 5. The activities of Defendant Flora as alleged in the Commission's
14 Complaint are in or affecting commerce, as "commerce" is defined in Section 4 of
15 the FTC Act, 15 U.S.C. § 44;

16 6. Defendant Flora has entered into this Order freely and without
17 coercion, and Defendant Flora acknowledges that he has read the provisions of this
18 Order, understands them, and is prepared to abide by them;

19 7. Plaintiff and Defendant Flora, by and through their counsel, have
20 agreed that the entry of this Order resolves all matters in dispute between them
21 arising from the Complaint in this action, up to the date of entry of this Order;

22 8. This Order is for settlement purposes only, and does not constitute and
23 shall not be interpreted to constitute an admission by Defendant Flora or a finding
24 that the law has been violated as alleged in the Complaint, or the facts alleged in
25 the Complaint, other than the jurisdictional facts are true, except as explicitly
26 stipulated in Section V of this Order;

27 9. Defendant Flora waives all rights to seek appellate review or
28 otherwise challenge or contest the validity of this Order. Defendant Flora further

waives and releases any claim he may have against the Plaintiff, its employees, representatives, or agents concerning the prosecution of this action to the date of this Order;

4 10. Defendant Flora agrees that this Order does not entitle him to seek or
5 to obtain attorneys' fees as a prevailing party under the Equal Access to Justice
6 Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this
7 Order. Each settling party shall bear its own costs and attorneys fees; and

8 11. Entry of this Order is in the public interest.

ORDER

DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

GENERAL DEFINITIONS

14 1. "Asset" means any legal or equitable interest in, right to, or
15 claim to, any real and personal property, wherever located.

16 2. “Defendant” means Phillip A. Flora, a/k/a “Phil P.” and any entity
17 through which he does business.

18 3. “Document” is synonymous in meaning and equal in scope to the
19 usage of the terms “document” and “electronically stored information” in Federal
20 Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts,
21 photographs, sound recordings, images, and other data or data compilations from
22 which information can be obtained or translated. A draft or non-identical copy is a
23 separate Document within the meaning of the term.

24 4. "Material Fact" means any fact that is likely to affect a Person's
25 choice of, or conduct regarding, goods or services.

26 5. “Person” means a natural person, organization, or other legal entity,
27 including a corporation, partnership, proprietorship, association, cooperative, or
28 any other group or combination acting as an entity.

6. "Plaintiff," "FTC," or "the Commission" means the Federal Trade Commission.

7. "Representatives" means any Person who:

- a. is in active concert or participation with Defendant; and
 - b. receives actual notice of this Order by personal service or otherwise.

8. "Unauthorized or Unsolicited Commercial Electronic Text"

8 "Message" means an unauthorized or unsolicited text message the primary purpose
9 of which is a commercial advertisement or promotion of a commercial product or
10 service (including the content on an Internet website operated for commercial
11 purposes).

12 9. The words "and" and "or" shall be understood to have both
13 conjunctive and disjunctive meanings.

CAN-SPAM ACT DEFINITIONS

15 10. "Commercial Electronic Mail Message" means any electronic mail
16 message the primary purpose of which is the commercial advertisement or
17 promotion of a commercial product or service (including the content on an Internet
18 website operated for commercial purposes). 15 U.S.C. § 7702(2).

11. "Electronic Mail Address" means a destination, commonly
expressed as a string of characters, consisting of a unique user name or mailbox
(commonly referred to as the "local part") and a reference to an Internet domain
(commonly referred to as the "domain part"), whether or not displayed, to which
an Electronic Mail Message can be sent or delivered. 15 U.S.C. § 7702(5).

12. "Electronic Mail Message" (or "email") means a message sent to a unique Electronic Mail Address. 15 U.S.C. § 7702(6).

26 13. "Initiate" or "Initiation," when used with respect to a Commercial
27 Electronic Mail Message, means to originate or transmit such message or to
28 Procure the origination or transmission of such message. 15 U.S.C. § 7702(9).

1 14. "Procure" or "Procurement," when used with respect to the
2 Initiation of a Commercial Electronic Mail Message, means intentionally to pay or
3 provide other consideration to, or induce, another Person to Initiate such a message
4 on one's behalf. 15 U.S.C. § 7702(12).

5 15. "Protected Computer" means a computer which is used in interstate
6 or foreign commerce or communication, including a computer located outside the
7 United States that is used in a manner that affects interstate or foreign commerce or
8 communication of the United States. 15 U.S.C. § 7702(13).

9 16. "Sender" means a Person who Initiates a Commercial Electronic Mail
10 Message and whose product, service, or Internet Web site is advertised or
11 promoted by the message. 15 U.S.C. § 7702(16).

CONDUCT PROHIBITIONS

I.

15 **IT IS HEREBY ORDERED** that Defendant, whether acting directly or
16 through a trust, corporation, subsidiary, division, or other device, is hereby
17 permanently enjoined from sending, or assisting others in the sending of
18 Unauthorized or Unsolicited Commercial Electronic Text Messages to mobile
19 telephones or other wireless devices.

II.

21 **IT IS FURTHER ORDERED** that Defendant and his Representatives,
22 whether acting directly or through a trust, corporation, subsidiary, division, or
23 other device, are hereby permanently enjoined from making, or assisting others in
24 making, any false or misleading oral or written statement or representation of
25 Material Fact when advertising, promoting, or selling any good or service,
26 including, but not limited to any false or misleading statement or representation
27 that Defendant, his Representatives, or any other Person is affiliated or associated
28 with, under contract with, acting in partnership with, endorsed or approved by, or

1 otherwise connected to the United States government or any government agency,
2 unit, or department.

3 **III.**

4 **IT IS FURTHER ORDERED** that Defendant and his Representatives,
5 whether acting directly or through a trust, corporation, subsidiary, division, or
6 other device, are hereby permanently enjoined from violating the CAN-SPAM Act,
7 15 U.S.C. §§ 7701-7713, including but not limited to, Initiating, Procuring, or
8 transmitting a Commercial Electronic Mail Message, or assisting others in the
9 Initiation, Procurement, or transmission of a Commercial Electronic Mail Message,
10 to a Protected Computer, that:

11 A. Does not include a clear and conspicuous notice of the recipient's
12 opportunity to decline to receive further Commercial Electronic Mail Messages
13 from the Sender at the recipient's Electronic Mail Address and describes the means
14 by which the recipient can decline to receive future Commercial Electronic Mail
15 Messages from the Sender; and

16 B. Does not include the Sender's valid physical postal address.

17 **COOPERATION PROVISION**

18 **IV.**

19 **IT IS FURTHER ORDERED** that Defendant shall, in connection
20 with this action or any subsequent investigations related to, or associated with, the
21 transactions or the occurrences that are the subject of the Plaintiff's Complaint,
22 cooperate in good faith with the Plaintiff and any other governmental agency or
23 entity, and appear at such places and times as the Plaintiff or any other
24 governmental agency or entity shall reasonably request, after written notice, for
25 interviews, conferences, pretrial discovery, review of documents, and for such
26 other matters as may be reasonably requested by the Plaintiff or any other
27 governmental agency or entity. If requested in writing by the Plaintiff or any other
28 governmental agency or entity, Defendant shall appear and provide truthful

1 testimony in any trial, deposition, or other proceeding related to, or associated
2 with, the transactions or the occurrences that are the subject of the Complaint,
3 without the service of a subpoena upon him.

4 **MONETARY RELIEF**

5 **V.**

6 **IT IS FURTHER ORDERED** that judgment is hereby entered in favor of
7 the Commission and against Defendant in the amount of \$58,946.90, as
8 disgorgement; *provided, however,* subject to the provisions of Section VI below,
9 judgment shall be suspended upon Defendant's completion of the requirements
10 stated in Subsections A & B of this Section.

11 A. Within ten (10) days of the entry of this Order, Defendant shall pay
12 the Commission \$32,000 by wire transfer in accordance with directions provided
13 by counsel for the Commission.

14 B. Defendant relinquishes all dominion, control, and title to the funds
15 paid to the fullest extent permitted by law. Defendant shall make no claim to or
16 demand return of these funds, directly or indirectly, through counsel or otherwise.

17 C. Defendant agrees that the facts as alleged in the Complaint filed in
18 this action shall be taken as true without further proof in any bankruptcy case or
19 subsequent civil litigation pursued by the Commission to enforce its rights to any
20 payment or money judgment pursuant to this Order, including but not limited to a
21 nondischargeability complaint in any bankruptcy case. Defendant further
22 stipulates and agrees that the facts alleged in the Complaint establish all elements
23 necessary to sustain an action pursuant to, and that this Order shall have collateral
24 estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11
25 U.S.C. § 523(a)(2)(A).

26 D. In accordance with 31 U.S.C. § 7701, Defendant is hereby required,
27 unless he has done so already, to furnish to the Commission his taxpayer
28 identification number (Social Security number), which shall be used for purposes

1 of collecting and reporting on any delinquent amount arising out of Defendant's
2 relationship with the government.

3 **RIGHT TO REOPEN**

4 **VI.**

5 **IT IS FURTHER ORDERED** that:

6 A. The Commission's agreement to and the Court's approval of this
7 Order are expressly premised upon the truthfulness, accuracy, and completeness of
8 Defendant's Financial Statements, all of which Defendant asserts are truthful,
9 accurate, and complete. Defendant and the Commission stipulate that Defendant's
10 Financial Statements provide the basis for the monetary judgment in Section V of
11 this Order and that the Commission has relied on the truthfulness, accuracy, and
12 completeness of Defendant's Financial Statements.

13 B. If, upon motion by the Commission, this Court finds that Defendant
14 has (1) materially misstated in Defendant's Financial Statements, the value of any
15 asset, (2) made any material misrepresentation or omitted material information
16 concerning his financial condition by failing to disclose any asset that should have
17 been disclosed in Defendant's Financial Statements, or (3) made any other material
18 misstatement or omission in Defendant's Financial Statements, the Court shall
19 terminate the suspension of the monetary judgment entered in Section V. The
20 Court, without further adjudication, shall enter a modified judgment holding the
21 Defendant liable to the Commission in the amount of \$58,946.90 for disgorgement,
22 less any amounts turned over to the FTC pursuant to Section V of this Order.
23 Upon such reinstatement of the monetary judgment, the Court shall make an
24 express determination that the judgment shall become immediately due and
25 payable by the Defendant and the Commission shall be entitled to interest
26 computed from the day of entry of this Order at the rate prescribed under 28 U.S.C.
27 § 1961, as amended, on the unpaid balance. The Commission shall be permitted to
28 execute on the judgment immediately after the suspension is lifted and engage in

7.500

1 discovery in aid of execution.

2 C. Defendant acknowledges and agrees that (1) this monetary judgment
3 is equitable monetary relief, solely remedial in nature, and not a fine, penalty,
4 punitive assessment, or forfeiture; (2) any proceedings instituted under this Section
5 would be in addition to, and not in lieu of, any other civil or criminal remedies as
6 may be provided by law, including any other proceedings that the FTC may initiate
7 to enforce this Order; and (3) all money paid to satisfy the monetary judgment is
8 irrevocably paid for purposes of settlement between the parties.

9 D. Should this Order be modified pursuant to this Section, this Order, in
10 all other respects, shall remain in full force and effect unless otherwise ordered by
11 the Court.

12

13 **PROHIBITION ON RELEASE OF CUSTOMER INFORMATION OR**
14 **CUSTOMER LISTS**

15 **VII.**

16 **IT IS FURTHER ORDERED** that Defendant and his Representatives,
17 whether acting directly or through a trust, corporation, subsidiary, division, or
18 other device, are hereby permanently restrained and enjoined from:

19 A. Selling, renting, leasing, transferring, or otherwise disclosing the
20 name, address, telephone number, credit card number, bank account number,
21 Electronic Mail Address, or other identifying information obtained from any
22 Person who:

23 1. Provided the identifying information in response to any
24 commercial electronic text message that was sent by Defendant or his
25 Representatives prior to the date of this Order or any Commercial Electronic Mail
26 Message that was sent, Initiated, Procured, or transmitted by Defendant or his
27 Representatives prior to the date of this Order;

28 2. Provided the identifying information prior to the date of this

1 Order via any website or web page that is owned, operated, controlled, or
2 registered in whole or in part by Defendant or his Representatives, on behalf of
3 Defendant or his Representatives, or for the benefit of Defendant and his
4 Representatives; or

5 3. Provided the identifying information prior to the date of this
6 Order via any website or web page that was advertised in any commercial
7 electronic text message that was sent by Defendant or his Representatives or
8 Commercial Electronic Mail Message that was sent, Initiated, Procured, or
9 transmitted by Defendant or his Representatives; and

10 B. Failing to dispose of such customer information in all forms in their
11 possession, custody, or control within thirty (30) days after entry of this Order.
12 Disposal shall be by means that protect against unauthorized access to the customer
13 information, such as by burning, pulverizing, or shredding any papers, and by
14 erasing or destroying any electronic media, to ensure that the customer information
15 cannot practicably be read or reconstructed.

16 Provided, that customer information need not be disposed of, and may be
17 disclosed, to the extent requested by a government agency or required by a law,
18 regulation, or court order.

19

20 **COMPLIANCE MONITORING**

21 **VIII.**

22 **IT IS FURTHER ORDERED** that, for the purpose of monitoring and
23 investigating compliance with any provision of this Order:

24 A. Within ten (10) days of receipt of written notice from a representative
25 of the Commission, Defendant shall submit additional written reports, which are
26 true and accurate and sworn to under penalty of perjury; produce documents for
27 inspection and copying; appear for deposition; and provide entry during normal
28 business hours to any business location in Defendant's possession or direct or

1 | indirect control to inspect the business operation:

2 B. In addition, the Commission is authorized to use all other lawful
3 means, including but not limited to:

4 1. obtaining discovery from any person, without further leave of
5 court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45, and
6 69;

7 2. having its representatives pose as consumers and suppliers to
8 the Defendant, his employees, or any other entity managed or controlled in whole
9 or in part by the Defendant, without the necessity of identification or prior notice;
10 and

11 C. Defendant shall permit representatives of the Commission to
12 interview any employer, consultant, independent contractor, representative, agent,
13 or employee who has agreed to such an interview, relating in any way to any
14 conduct subject to this Order. The person interviewed may have counsel present.
15 *Provided however*, that nothing in this Order shall limit the Commission's lawful
16 use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15
17 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things,
18 testimony, or information relevant to unfair or deceptive acts or practices in or
19 affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

COMPLIANCE REPORTING

IX.

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

A. For a period of five (5) years from the date of entry of this Order,

1. Defendant shall notify the Commission of the following:

a. Any changes in Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

- 1 b. Any changes in Defendant's employment status
2 (including self-employment), and any change in
3 Defendant's ownership in any business entity, within ten
4 (10) days of the date of such change. Such notice shall
5 include the name and address of each business that
6 Defendant is affiliated with, employed by, creates or
7 forms, or performs services for; a detailed description of
8 the nature of the business; and a detailed description of
9 Defendant's duties and responsibilities in connection
10 with the business or employment; and
11 c. Any changes in Defendant's name or use of any aliases
12 or fictitious names within ten (10) days of the date of
13 such change;

14 2. Defendant shall notify the Commission of any changes in
15 structure of any business entity that Defendant directly or indirectly controls, or
16 has an ownership interest in, that may affect compliance obligations arising under
17 this Order, including but not limited to: incorporation or other organization; a
18 dissolution, assignment, sale, merger, or other action; the creation or dissolution of
19 a subsidiary, parent, or affiliate that engages in any acts or practices subject to this
20 Order; or a change in the business name or address, at least thirty (30) days prior to
21 such change, *provided* that, with respect to any such change in the business entity
22 about which Defendant learns less than thirty (30) days prior to the date such
23 action is to take place, Defendant shall notify the Commission as soon as is
24 practicable after obtaining such knowledge.

25 B. One hundred eighty (180) days after the date of entry of this Order
26 and annually thereafter for a period of five (5) years, Defendant shall provide a
27 written report to the FTC, which is true and accurate and sworn to under penalty of
28 perjury, setting forth in detail the manner and form in which they have complied

and are complying with this Order. This report shall include, but not be limited to:

1. Defendant's then-current residence address, mailing addresses, and telephone numbers;

2. Defendant's then-current employment status (including self-employment), including the name, addresses, and telephone numbers of each business that such Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment;

3. Any other changes required to be reported under Subsection A of this Section; and

4. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the Section titled "Distribution of Order."

C. Defendant shall notify the Commission of the filing of a bankruptcy petition by Defendant within fifteen (15) days of filing.

D. For the purposes of this Order, Defendant shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier (not the U.S. Postal Service) all reports and notifications to the Commission that are required by this Order to:

Associate Director for Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
RE: FTC v. Flora.

Provided that, in lieu of overnight courier, Defendant may send such reports or notifications by first-class mail, but only if Defendant contemporaneously sends an electronic version of such report or notification to the Commission at DEBrief@ftc.gov.

E. For purposes of the compliance reporting and monitoring required by

1 this Order, the Commission is authorized to communicate directly with the
2 Defendant.

3 **RECORDKEEPING**

4 X.

5 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the
6 date of entry of this Order, Defendant is hereby restrained and enjoined from
7 failing to create and retain the following records for any business for which he is
8 the majority owner or directly or indirectly controls:

9 A. Accounting records that reflect the cost of goods or services sold,
10 revenues generated, and the disbursement of such revenues;

11 B. Personnel records accurately reflecting: the name, address, and
12 telephone number of each person employed in any capacity by such business,
13 including as an independent contractor; that person's job title or position; the date
14 upon which the person commenced work; and the date and reason for the person's
15 termination, if applicable;

16 C. Customer files containing the names, addresses, phone numbers,
17 dollar amounts paid, quantity of items or services purchased, and description of
18 items or services purchased, to the extent such information is obtained in the
19 ordinary course of business;

20 D. Complaints and refund requests (whether received directly or
21 indirectly, such as through a third party,) and any responses to those complaints or
22 requests;

23 E. Copies of all sales scripts, training materials, advertisements, or other
24 marketing materials; and

25 F. All records and documents necessary to demonstrate full compliance
26 with each provision of this Order, including but not limited to, copies of
27 acknowledgments of receipt of this Order required by the Sections titled
28 "Distribution of Order" and "Acknowledgment of Receipt of Order" and all reports

1 submitted to the FTC pursuant to the Section titled "Compliance Reporting."

2

3 **DISTRIBUTION OF ORDER**

4 **XI.**

5 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the
6 date of entry of this Order, Defendant shall deliver copies of the Order as directed
7 below:

8 A. Defendant as control person: For any business that Defendant
9 controls, directly or indirectly, or in which Defendant has a majority ownership
10 interest, Defendant must deliver a copy of this Order to: (1) all principals, officers,
11 directors, and managers of that business; (2) all employees, agents, and
12 representatives of that business who engage in conduct related to the subject matter
13 of the Order; and (3) any business entity resulting from any change in structure set
14 forth in Subsection A.2 of the Section titled "Compliance Reporting." For current
15 personnel, delivery shall be within five (5) days of service of this Order upon
16 Defendant. For new personnel, delivery shall occur prior to them assuming their
17 responsibilities. For any business entity resulting from any change in structure set
18 forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery
19 shall be at least ten (10) days prior to the change in structure.

20 B. Defendant as employee or non-control person: For any business
21 where Defendant is not a controlling person of a business but otherwise engages in
22 conduct related to the subject matter of this Order, Defendant must deliver a copy
23 of this Order to all principals and managers of such business before engaging in
24 such conduct.

25 C. Defendant must secure a signed and dated statement acknowledging
26 receipt of the Order, within thirty (30) days of delivery, from all persons receiving
27 a copy of the Order pursuant to this Section.

28

ACKNOWLEDGMENT OF RECEIPT OF ORDER

xiii.

3 IT IS FURTHER ORDERED that Defendant, within five (5) business days
4 of receipt of this Order as entered by the Court, must submit to the Commission a
5 truthful sworn statement acknowledging receipt of this Order.

RETENTION OF JURISDICTION

XIII.

9 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of
10 this matter for purposes of construction, modification, and enforcement of this
11 Order.

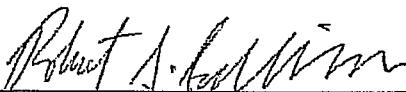
14 IT IS SO ORDERED, this ~~Aug~~ 12TH day of AUG 2011, at
15 2:20 PM.

Judge Andrew J. Guilford
United States District Judge
Central District of California

1 The parties consent to the terms and conditions set forth above and consent to
2 entry of this Stipulated Permanent Injunction and Final Order at the Court's
3 convenience and without further notice to the parties.

4

5 PLAINTIFF:

6 

7 Dated:

8/10/11

9 Robert G. Schoshinski, DC # 429736
rschoshinski@ftc.gov
10 Christine M. Todaro, OH # 0084976
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Federal Trade Commission
600 Pennsylvania Avenue, N.W.
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(202) 326-3219 (Schoshinski)
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18 Attorneys for Plaintiff
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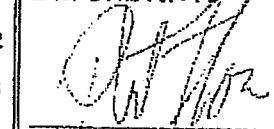
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1 DEFENDANT:

2 
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4 Dated:

5 6/9/11

6 Philip A. Flora

7 
8

9 Dated:

10 6/10/11

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